Supreme Court, U.S.
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No. 94 -

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

NORINSBERG CORPORATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

Petition For Writ Of Certiorari
to the District of Columbia Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was a written memorandum authored by the key testifying witness, which served as a basis for revoking Petitioner's federal license, covered by the Jencks Act, 18 U.S.C. 3500?

2. If so, was the failure to produce the written memorandum harmless error?

LIST OF ALL PARTIES

The petitioner, who was the petitioner in the action below, is Norinsberg Corporation. The respondent, who was the respondent in the action below, is the United States Department of Agriculture.

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UNITED STATES DEPARTMENT OF AGRICULTURE,

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Petition For Writ Of Certiorari
To The District of Columbia Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Norinsberg Corporation respectfully petitions this Court for a Writ Of Certiorari to review the judgment of the District of Columbia Circuit Court of Appeals in this case.

OPINIONS BELOW

The order of the District of Columbia Circuit Court of Appeals denying rehearing is reproduced in Petitioner's Appendix at page A-1. The judgment and opinion of the District of Columbia Circuit Court of Appeals is reproduced in Petitioner's Appendix at pages B-1 to B-13. The decision and order by the Judicial Officer is reproduced in Petitioner's Appendix at pages C-1 to C-18. The decision and order of the Administrative Law Judge is reproduced in Petitioner's Appendix at pages D-1 to D-8. References to Petitioner's Appendix shall be designated as "(Pet. App.)".

JURISDICTION

The District of Columbia Circuit Court of Appeals denied Petitioner's Petition for Review on March 3, 1995. Petitioner's Petition for Rehearing was denied by the District of Columbia Circuit Court of Appeals on May 12, 1995. There have been no proceedings since that date. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

This petition involves an interpretation of the Jencks Act, 18 U.S.C. 3500, which is reprinted in the appendix hereto.

INTRODUCTION

In its panel decision of March 3, 1995, the District of Columbia Circuit Court of Appeals held that a certain portion of a memorandum authored by Respondent's key testifying witness which summarized the facts of this administrative action was not subject to disclosure under the Jencks Act, 18 U.S.C. 3500, because it could not conceivably have been used to impeach the witness and therefore did not "relate to" the witness' testimony on direct examination. While the District of Columbia Circuit Court of Appeals held that the balance of the memorandum did qualify as Jencks Act material which should have been produced to Petitioner, the failure to disclose the same was held to be harmless error. Thus, the Court upheld an administrative determination to revoke Petitioner's license under the Perishable Agricultural Commodities Act by engaging in speculation as to whether or not the memorandum could have been used to impeach the witness, while at the same time acknowledging that courts should not speculate as to whether or not Jencks material could be used effectively in defense of a charge. There is a conflict between the District of Columbia Circuit Court of Appeals' decision and precedent from this Court.

STATEMENT OF THE CASE

Petitioner, Norinsberg Corporation ("Norinsberg") is a closed corporation organized under the laws of the State of New York which, for the past 70 years, has been in the business of supplying apples to retailers. As such, it is subject to regulation pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq*) ("PACA"). Appellant was issued its PACA license on August 12, 1975 and said license has been renewed annually since that time.

On September 28, 1992, a complaint was filed against Petitioner, Norinsberg Corporation ("Norinsberg") by Respondent, the United States Department of Agriculture ("USDA") in which it was contended that Norinsberg had violated the prompt payment provisions of PACA (7 U.S.C. 499b(4)) during the period from April, 1991 through February, 1992 when Norinsberg purchased perishable agricultural commodities in interstate commerce but failed to make prompt payment (within ten days) to ten creditors.

A hearing was held on July 21, 1993 before an Administrative Law Judge at which USDA's key witness, Clare Jervis, Senior Marketing Specialist for USDA, testified that she had prepared a written memorandum ("the memorandum") directed to the chief of the PACA branch which set forth her analysis of the history and status of Norinsberg's PACA license, as well as her analysis of the evidence of Norinsberg's alleged PACA violations. Ms. Jervis further testified that based upon her review and analysis of the records, she participated in a recommendation made to the chief of the PACA branch as to what sanction should be sought, and why USDA thought that revocation of Petitioner's PACA license was the appropriate sanction and would further the PACA's remedial purposes (Pet. App. E-2, E-7 to E-11).

Norinsberg requested a copy of the memorandum and USDA declined to produce the same. Following an *in camera*

inspection of the memorandum at issue, the Administrative Law Judge held that the memorandum was an internal memoranda of analysis rather than a factual memo with respect to evidence personally obtained by Ms. Jervis and need not be produced pursuant to the Jencks Act. (Pet. App. E-14 to E-15). At the conclusion of all testimony, the Administrative Law Judge granted USDA's Motion for a Bench Ruling and, after hearing proposed findings of fact and conclusions of law from counsel, issued a bench ruling in which he found that Norinsberg had violated the prompt payment requirements of PACA and revoked Norinsberg's license.

Norinsberg appealed the Administrative Law Judge's decision to the Judicial Officer. On September 24, 1993, the Judicial Officer upheld the Administrative Law Judge's decision. With respect to Norinsberg's contention that the Jencks Act had been violated, the Judicial Officer held that the memorandum at issue was not covered by the Jencks Act because it merely explained other records and documents in USDA's investigative file. (Pet. App. C-12).

A Petition for Review was filed by Norinsberg with the District of Columbia Circuit Court of Appeals pursuant to 28 U.S.C. 2342 on December 14, 1993. Following briefing and oral argument, the Court of Appeals denied the Petition for Review and held harmless any Jencks Act error committed. Specifically, the Court of Appeals compared the content of the memorandum with the testimony by Ms. Jervis and held that a portion of the memorandum could not have been utilized to impeach her testimony and, therefore, did not "relate to" her testimony. Accordingly, this portion of the memorandum was held to be unprotected by the Jencks Act. (Pet. App. B-11). While the balance of the memorandum was held to be Jencks Act material, the Court of Appeals held that the failure to produce that part of the memorandum was harmless error,

because the information contained therein was duplicative of matter already in Norinsberg's possession. (Pet. App. B-12).

Norinsberg's Petition for Rehearing was denied by the District of Columbia Circuit Court of Appeals on May 12, 1995.

REASON FOR GRANTING THE WRIT

In its Petition for Review, Norinsberg argued that the imposition of the sanction of revocation of its PACA license was arbitrary and an abuse of discretion because certain mitigating factors had not been considered. In holding that a portion of the memorandum at issue did not "relate to" the subject matter of the testimony of Ms. Jervis and was therefore not covered by the Jencks Act, the Court of Appeals engaged in impermissible speculation as to whether or not that portion of the material could have been used effectively in defense of the charges asserted against Norinsberg. While the memorandum at issue may not contain an actual recommendation as to imposition of a sanction against Petitioner, it is undisputed that the memorandum served as the key basis for the revocation sanction imposed on Norinsberg. Ms. Jervis was USDA's sole and key factual witness on this issue and testified at the administrative hearing that the memorandum was an analysis of the documents obtained during USDA's investigation into alleged violations of PACA by Norinsberg, as well as the history and status of Norinsberg's PACA license. (Pet. App. E-7 to E-11). She also testified that "based upon my review and analysis of the records, I participate in a recommendation made to the chief of the branch as to what appropriate sanction might be taken against the firm." (Pet. App. E-2).

In other words, *based upon her memorandum*, Ms. Jervis participated in a recommendation as to what sanction would be appropriate to be imposed against Norinsberg. In light of the admission by the testifying witness that her memorandum served as the basis for making a sanction recommendation,

Norinsberg submits that the *entire* memorandum "relates to" Ms. Jervis's testimony and should have been produced under the Jencks Act, especially where the issue is the consideration and weight to be given to the number of "relevant circumstances" surrounding imposition of a sanction:

> "Flat contradiction between the witness' testimony and the version of events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

Clancy v. United States, 365 U.S. 312, 81 S.Ct. 645, 648 (1961), citing *Jencks v. United States*, 353 U.S. 657, 77 S.Ct. 1007 (1957).

When asked on direct examination what factors were considered in fashioning the sanction of revocation by the Department of Agriculture, Ms. Jervis responded: "We look at several factors: the number of violations, the dollar amount, the time period and the effect of these types of violations, failures to pay, upon the industry." (Pet. App. E-3). Norinsberg was prejudiced by not being provided with a copy of Ms. Jervis' written analysis of the evidence supporting these factors, as the memorandum could have aided counsel in his cross-examination and possible impeachment of her testimony regarding the significance of each factor discussed in the memorandum and omission of other relevant, mitigating factors from the memorandum.

Similarly, the Court of Appeals' holding that the failure to produce the portion of the memorandum which constituted Jencks Act material was harmless error because Norinsberg already had access to the history and status of its PACA license misses the point. The issue is whether there are any variances between the Jencks material and the witness' testimony. While

Norinsberg had access to the history and status of its PACA license, it has never had access to the Jencks material, which is Ms. Jervis' analysis of the history and status of the Norinsberg PACA license as set forth in her memorandum.

In sum, Jencks Act violations occurred which were not harmless error. As this Court recognized in *Clancy v. United States*, *supra*, "(s)ince the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been used effectively." *Id.* at 365 U.S. 312, 316. The Court of Appeals recognized in its decision that Norinsberg was entitled to at least a portion of the memorandum at issue. The Jencks Act violations were prejudicial to Norinsberg and cannot be considered harmless error. Accordingly, Norinsberg submits that its petition for writ of certiorari be granted on this issue.

CONCLUSION

The case at bar presents an important issue, the resolution of which is necessary to preserve the purpose of the Jencks Act: to enable the defense to impeach a government witness by bringing any variances between Jencks material and the witness' testimony to the attention of the trier of fact. The importance of the issue raise coupled with the conflict between the District of Columbia Circuit Court of Appeals' decision with precedent from this Court warrants a review by the Court.

The petition for writ of certiorari should be granted.

Respectfully submitted,

NORINSBERG CORPORATION

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-1842
September Term, 1994

Norinsberg Corporation,

Petitioner,

v.

Department of Agriculture,

Respondent

BEFORE: Wald, Silberman and Tatel, Circuit Judges

ORDER

Upon consideration of Petitioners's Petition for Rehearing Filed April 14, 1995, it is

ORDERED by the Court, that the petition is denied. Filed May 12, 1995

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-1842
September Term, 1994

Norinsberg Corporation,

Petitioner,

v.

United States Department of Agriculture;
United States of America,

Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE: Wald, Silberman and Tatel, Circuit Judges

JUDGMENT

This cause came on to be heard on the petition for review of an order of the United States Department of Agriculture and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petition for review is denied, in accordance with the Opinion of the Court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bunner
Robert A. Bonner
Deputy Clerk

Date: March 3, 1995
Opinion for the Court filed by Circuit Judge Wald

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 6, 1995 Decided March 3, 1995

No. 93–1842

NORINSBERG CORPORATION,
PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE;
UNITED STATES OF AMERICA,
RESPONDENTS

Petition for Review of an Order of the Secretary, United States Department of Agriculture

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Alexander J. Pires argued the cause and filed the briefs for petitioner.

Stephen M. Reilly, Attorney, Office of the General Counsel, United States Department of Agriculture, argued the cause for respondents. With him on the brief was *James Michael*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Kelly, Associate General Counsel, United States Department of Agriculture. *Raymond W. Fullerton* entered an appearance.

Before WALD, SILBERMAN, and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge:* The Norinsberg Corporation ("Norinsberg" or "Corporation") seeks review of an order of the Secretary of the United States Department of Agriculture ("Secretary" or "Department"). Norinsberg contends that the Secretary's decision to revoke the Corporation's Perishable Agricultural Commodities Act ("PACA") license failed to weigh mitigating circumstances appropriately and was therefore arbitrary and capricious. Norinsberg also argues that the Administrative Law Judge ("ALJ") committed reversible error in denying the Corporation's request—under the Jencks Act, 18 U.S.C. § 3500 (1988)—for a document that had been prepared by one of the Secretary's testifying witnesses summarizing the Department's investigative file. We find no merit in petitioner's objections and deny the petition for review.

I. BACKGROUND

A. *Regulatory and Factual Background*

The PACA requires dealers in fresh fruits and vegetables to obtain a license from the Department. 7 U.S.C. §§ 499a(4), 499c (1988). The Act makes it unlawful for licensees to fail or refuse to make "full payment promptly" [1] when obtaining their wares, *id.* § 499b(4), and permits the Secretary to revoke the license of merchants found guilty of "flagrant or repeated violations." [2] *Id.* § 499h(a).

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[1] 7 C.F.R. § 46.2(aa)(5) defines "full payment promptly" for produce purchases as "within 10 days after the day on which the produce is accepted."

[2] The Administrative Procedure Act ("APA"), 5 U.S.C. § 558(c) (1988), imposes the additional requirement that violations be "willful" before a sanction of revocation may be imposed.

The Norinsberg Corporation became a PACA licensee in 1975, and at the time of the events involved here was in the business of supplying apples to supermarket chains. The Corporation was owned by the Norinsberg family, who also owned Cornwall Orchards—a PACA licensee—and the Vermont Apple Company, which was not PACA-licensed.

In December 1990, the Bank of Boston took over the ailing Bank of Vermont and called loans outstanding to Cornwall Orchards and the Vermont Apple Company totaling about $4 million. To satisfy this debt, the Norinsberg family obtained a $2 million loan, and took the remainder of the money owed from the Norinsberg Corporation and family funds. The Corporation was left with limited operating capital.

From March 1991 through February 1992, Norinsberg purchased 46 lots of apples from 10 suppliers. With little cash on hand, the Corporation was unable to make "full payment promptly," *id.* § 499a(4), of about $424,000. In September 1992, the Director of the Fruit and Vegetable Division of the Department issued a complaint charging Norinsberg with PACA violations, and requesting that the Corporation's license be revoked because the violations were "willful, flagrant, and repeated."

A hearing before an ALJ was scheduled for July 1993. By that time, Norinsberg had reached payment agreements with all of its suppliers, but still owed about $250,000—personally guaranteed by the Norinsberg family—for the purchases at issue.

B. *Procedural Background*

At the hearing, Norinsberg did not dispute that it had violated the PACA. Rather, through counsel and its sole witness, Mr. Norinsberg, the Corporation urged the ALJ to consider a number of mitigating circumstances, including: Norinsberg's financial difficulties; the fact that it had reached consensual payment agreements with its suppliers; the absence of any "actual harm" to its suppliers; and the potential harm to its creditors from suspending its license.

The Secretary called two witnesses from within the Department. William Addington, the investigator who had inquired into Norinsberg's PACA violations, testified to their nature and extent. The Secretary also presented a "sanction witness," Clare Jervis, who relayed the Department's recommendation of revocation to the ALJ. During Ms. Jervis's testimony, Norinsberg requested production—under the Jencks Act, 18 U.S.C. § 3500—of a memorandum prepared by Jervis summarizing the agency file in the Norinsberg proceeding. After reviewing the document, the ALJ denied production on the grounds that it was "an internal agency analysis which [was] used in connection with its preparation for its case," and not a "statement that [the witness] had made with respect to th[e] substance of [her] direct testimony...."

At the close of the hearing, the ALJ issued an Oral Initial Decision and Order from the bench. He found that the Company had, in fact, failed to make "full payment promptly" for the shipments at issue, and that the violations were "willful, flagrant, and repeated." He adopted the Secretary's sanction recommendation and revoked Norinsberg's PACA license.

The Company appealed to the Department's Judicial Officer ("JO"), to whom the Secretary has delegated final authority in adjudicative proceedings. *See* 7 C.F.R. §§ 1.132(d), 2.35. The JO essentially adopted the decision of the ALJ, with some additional analysis of his own. *See In re The Norinsberg Corporation*, 52 Agric. Dec. 1617 (1993). The JO later rejected the Company's petition for rehearing, and stayed his order pending our consideration of Norinsberg's petition for review.

II. Analysis

A. *The Secretary's Choice of Sanction*

Norinsberg's primary contention is that the Secretary's decision to revoke rather than suspend the Corporation's PACA license was an abuse of discretion. Norinsberg does

not, however, challenge the Secretary's conclusion that the underlying PACA violations were "willful, flagrant and repeated," which justifies revocation under § 499h(a) and § 558(c) of the APA. Norinsberg also admits that it is the Secretary's policy to require that full payment be made by the time of the administrative hearing—together with present compliance with the PACA—to avoid the sanction of revocation in cases of "flagrant, repeated, and willful" violations. *See, e.g., In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118, 149–54 (1984). Nonetheless, Norinsberg urges that the Secretary was obligated to give greater weight to "mitigating factors" in determining the sanction in this case.

The Department has recently indicated that the particular circumstances of each case are a relevant part of the sanction analysis. In *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991), the JO wrote:

> [R]eliance will no longer be placed on the "severe" sanction policy set forth in many prior decisions [citation omitted]. Rather, the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

See Norinsberg, 52 Agric. Dec. at 1627. In light of *S.S. Farms*, we are somewhat puzzled by the Secretary's argument that our earlier case, *Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774, 782 (D.C. Cir. 1983), is controlling precedent for the proposition that "alleged mitigating factors are irrelevant" to the Department's sanction determinations under the PACA. *Cf. ABL Produce, Inc. v. USDA*, 25 F.3d 641, 646 (8th Cir. 1994) (holding that the JO had *not* considered "all relevant circumstances" in imposing the sanction of PACA license revocation, and remanding for reinstatement of suspension as ordered by the ALJ).

Nonetheless, we are convinced that the Secretary's determination in this case was consistent with the policy articulated in *S.S. Farms.* Norinsberg does not question that both the ALJ and the JO carefully "examin[ed] the nature of the violations in relation to the remedial purposes of the regulatory statute involved." It is equally clear that both "g[ave] appropriate weight to the recommendation[ ] of the administrative officials charged with the responsibility for achieving the congressional purpose"—indeed, they adopted the Department's recommendation of license revocation. Norinsberg's challenge thus goes only to whether "all relevant circumstances" were considered.

The "circumstances" that Norinsberg claims the Department ignored fall into essentially four categories: (1) the Corporation's financial difficulties; (2) the various accords that Norinsberg eventually reached with its suppliers; (3) the absence of "actual harm" to the suppliers; and (4) the potential harm to the Corporation's creditors from suspending its license. Our review of the record, however, indicates that these "mitigating factors" were in fact all considered though ultimately rejected by the JO.

First, the JO observed that the Corporation's "financial hardship" resulted in large part from the Norinsberg family's efforts to rescue their non-PACA business enterprises. *See Norinsberg,* 52 Agric. Dec. at 1625. Moreover, when Norinsberg realized that its financial hardship would render it unable to meet the Act's prompt payment requirement, it did not seek written agreements from its suppliers providing for payment periods in excess of ten days, as authorized by the Department's regulations, *see* 7 C.F.R. § 46.2(aa)(11); instead it continued to make produce purchases without fulfilling the Act's prompt payment mandate. *Norinsberg,* 52 Agric. Dec. at 1625.

The JO also indicated that Norinsberg's consent settlements with its suppliers could not be considered "mitigating factors" under the PACA. *Id.* at 1626. Indeed, it would eviscerate the Act's prompt payment requirement if payment agreements reached after payment was due sufficed to erase

the original violations. Nor was the JO convinced that there was no "actual harm" to the creditors; he cited testimony by the Department's sanction witness that failure to pay promptly would "hurt any produce firm." *Id.* at 1629. The JO also dismissed Norinsberg's objection that revoking the Corporation's license would cause hardship to its creditors, since the remaining debt to those sellers was personally guaranteed by Mr. Norinsberg.

Our review of the Secretary's choice of sanction is limited both by statute and Supreme Court precedent. The APA confines our inquiry to whether the sanction imposed was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1988). Moreover, the Supreme Court has specifically stated that "the ... choice of [administrative] sanction [is] not to be overturned unless the Court of Appeals [ ] find[s] it unwarranted in law or ... without justification in fact...." *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185–86 (1973) (internal citation omitted). On the particular facts of this case, we think it clear that the Secretary's decision to revoke Norinsberg's PACA license was within his discretion.

B. *The Jencks Act*

Norinsberg also contends that the ALJ's failure to order disclosure of a prior statement by Clare Jervis, a Department official who testified at the administrative hearing, was prejudicial error. The Corporation made a timely request under the Jencks Act, 18 U.S.C. § 3500,[3] for a brief memorandum prepared by Jervis in connection with the case. The Department refused to disclose the document to the Corporation, but did provide it to the ALJ for review *in camera*. The ALJ ruled that it was not Jencks material on the grounds that it was "an internal memo of analysis rather than a factual memo with respect to evidence that was personally obtained by this witness," and was not a "statement that [the witness] had

[3] ALJ proceedings within the Department are subject to the Jencks Act under 7 C.F.R. § 1.141(g)(1)(iii).

made with respect to th[e] substance of [her] direct testimony." [4]

The Jencks Act provides, in pertinent part:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness ... which relates to the subject matter as to which the witness has testified.
>
> ....
>
> (e) The term "statement," as used in subsection[ ] (b) ... in relation to any witness called by the United States, means—
>
> (1) a written statement made by such witness and signed or otherwise adopted or approved by him....

Id. §§ 3500(b), 3500(e). The Act thus states that a document must be divulged if it is both a witness's "statement" and "relates to" her testimony on direct examination. We therefore reject the ALJ's unfounded distinction between "factual" and "analytical" documents, and turn instead to the two-prong inquiry suggested by the Act.

The initial question is whether Jervis's memorandum was a "statement." The Secretary argues, citing *Blackfoot Livestock Com'n v. USDA*, 810 F.2d 916 (9th Cir. 1987), that "brief memoranda" explaining the documents in an investigative file are not "statements" within the meaning of the Jencks Act. *Blackfoot* does not, however, sustain this broad reading. There the petitioner sought access to the Department's entire investigative file, including "records and documents, as well as brief memoranda explaining these documents." *Id.* at 923. The court wrote that "[b]ecause Blackfoot was given any memorandum authored by the testifying investigators, it was not denied Jencks materials. The statements and accompanying documents of witnesses who did not

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[4] The ALJ also ruled that a cover sheet not prepared by Jervis was not Jencks material. Norinsberg does not dispute this holding and we do not discuss it here.

testify are [ ] not discoverable under the Jencks Act." *Id.* The memorandum not disclosed in this case was, of course, written by a "testifying investigator," and *Blackfoot* is therefore inapposite.

Cases decided under the Jencks Act however have drawn a distinction between "statements" and mere "notes." In *United States v. Carrasco*, 537 F.2d 372, 375 (9th Cir. 1981), for example, the court wrote that "a statement[ ] unlike notes . . . seeks to transmit information from the declarant to the reader." Therefore, "rough [ ] notes" generally will not exhibit "sufficient completeness or intent to communicate" to qualify as Jencks Act statements. *United States v. Griffin*, 659 F.2d 932, 938 n.4 (9th Cir. 1981). Applied to *Norinsberg*, however, the statements/notes distinction does not help the Secretary either. Having reviewed the document at issue in this case, we conclude that it was more than mere "notes"; the entire purpose of Jervis's "Memo to File" was to "transmit information" to any Department official who would later read it. We therefore find that Jervis's memorandum could qualify as a "statement" within the meaning of § 3500(e).

The question whether Jervis's statement "relates to"—*see* § 3500(b)—her testimony, however, poses greater difficulty. Jervis's direct testimony included three components. First, she interpreted for the ALJ documents indicating that Norinsberg had a current PACA license. She then testified regarding a number of phone calls to Norinsberg's suppliers, concerning the Corporation's debts outstanding to the sellers. Finally, she presented the Department's position that Norinsberg's license should be revoked, and explained why the Department thought that disposition would further the PACA's remedial purposes.

The great bulk of Jervis's memorandum does not bear directly on any of these three subjects; rather, it summarizes the factual background of the Norinsberg case from other documents in the agency file. Indeed, neither the phone calls—all of which occurred after the memorandum was written—nor the Department's sanction recommendation appears in the document at all. While we recognize that the term

"relates to" is very broad in isolation, we note that the object of the prepositional phrase is "the subject matter *as to which the witness has testified*" (emphasis added), *not* the "subject matter of the proceeding" generally. It is therefore problematical in our view whether the summary of facts in the memorandum "relates to" Jervis's direct testimony regarding the phone calls or the sanction recommendation in the manner envisioned by the Act. *Cf. United States v. Smaldone*, 544 F.2d 456 (10th Cir. 1976) (holding that a document summarizing a witness's general knowledge of drug trafficking in Denver, in which Smaldone was discussed, did not "relate to" the witness's trial testimony describing a particular drug transaction with Smaldone). The details contained in Jervis's memorandum "relate to" the phone call and sanction portions of Jervis's testimony only in the extremely attenuated sense that any fact about the case bears some "relation" to any testimony in the case.

We do not think that meaning of "relate" is intended by the Jencks Act. In construing the term "related to," we must keep the relevant purpose of the Act in view: "[T]he Jencks Act ... was intended to enable the defense to impeach a government witness by bringing any [ ] variances [between Jencks material and the witness's testimony] to the attention of [the finder of fact]." *United States v. Prieto*, 505 F.2d 8, 11 (5th Cir. 1974); *see also United States v. Harrison*, 524 F.2d 421, 431 n.29 (D.C. Cir. 1975). The "relates to" provision of § 3500(b) thus serves to ensure that only documents overlapping with the subject matter of the testimony—and so potentially containing inconsistencies—need be disclosed. Because the memorandum sought in this case simply did not contain information on either the phone calls or the sanction recommendation, it could not conceivably have been used to impeach Jervis on those matters, and was not "related to" those portions of her testimony.[5]

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[5] Moreover, we note that it is highly questionable whether the main purpose for which Norinsberg sought the memorandum—to impeach Jervis's sanction testimony—would be a permissible one, even had the memorandum contained an inconsistent recommenda-

On the other hand, the memorandum does contain several lines concerning the history and status of Norinsberg's PACA license. This portion of the document "relates" to the opening portion of Jervis's testimony, which addressed the same subject matter. Clearly, to the extent the licensure facts in the memorandum differed from those presented by Jervis at the hearing, the document could have permitted impeachment of the witness. This part of the memorandum therefore does qualify as Jencks material, and should have been turned over to Norinsberg. We nonetheless conclude, however, that the failure to disclose the material does not entitle Norinsberg to a new administrative hearing.

It is true that the harmless-error standard is "strictly applied" to Jencks Act violations because holding an error harmless requires us to speculate whether Jencks material could have been used effectively in defense of the charge. *See, e.g., United States v. Lam Kwong-Wah*, 924 F.2d 298, 310 (D.C. Cir. 1991). But on the other hand "the Jencks Act does not contemplate automatic sanctions" for any violation. *Id.* Indeed, a number of courts have held harmless the failure to order disclosure of Jencks material where "the [information sought] merely duplicate[s] matter already in the defendant's possession." *See, e.g., United States v. Pepe*, 747 F.2d 632, 657 (11th Cir. 1984); *United States v. Rivero*, 554 F.2d 213 (5th Cir. 1977). In this case, Norinsberg clearly had independent access to the limited and basically innocuous licensure information in the Jervis memorandum.

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tion by Jervis. The witness's presentation of the Departmental sanction recommendation was not factual or even opinion testimony of her own, but rather represented the final product of agency deliberations. Any opinion of the witness that formed part of that deliberative process would presumably be protected from Jencks Act disclosure. *Cf. United States v. Morgan*, 313 U.S. 409, 422 (1941) (intra-agency memoranda and documents leading to an agency decision are privileged from discovery, to preserve the integrity of the administrative process). Needless to say, however, it would be far less confusing to ALJs implementing the Jencks requirement to have the departmental recommendation presented in a form other than sworn testimony.

III. Conclusion

We find that the Secretary's choice of sanction was within his discretion. We further hold harmless any Jencks Act error committed. The petition for review is denied.

So ordered.

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[1] *See generally* Campbell, *The Perishable AGricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1989) Cum. Supp.), and Becker and Whitten, *Perishable Agricultral Commodities Act*, in 10 Harl, Agricultural law, ch. 72 (1980).

[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan no. 2 of 1953, 18 Fed. Reg. 3219 91953), *reprinted in* 5 U.S.C. app. at 1280 (1988).

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re: The Norinsberg Corporation,

Respondent

PACA Docket No. D-92-571

RECEIVED
U.S. Dept. of Agr.
September 24, 1993
The Hearing Clerk
OALJ

Decision and Order

This is disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*)[1] in which Administrative Law Judge Edwin S. Bernstein (ALJ) filed a bench Initial Decision and Order on August 9, 1993, revoking Respondent's license because Respondent failed to make full payment promptly to 10 sellers for perishable agricultural commodities totalling $424,913.75, which was reduced to approximately $250,000 at the time of the hearing.

On August 19, 1993, Respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C.§§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[2] On September 2, 1993, the case was referred to the Judicial Officer for decision.

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[1] *See generally* Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1989) Cum. Supp.), and Becker and Whitten, *Perishable Agricultral Commodities Act*, in 10 Harl, Agricultural law, ch. 72 (1980).

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Respondent's request for oral argument, which is discretionary (7 C.F.R. §1.145(d)), is denied inasmuch as the issues have been thoroughly briefed, the case is governed by settled precedents, and there would appear to be no need for further argument.

Based upon a careful consideration of the record, the Initial Decision and Order is adopted as the final Decision and Order in this case, with additions shown in brackets and a few trivial editorial changes not specified, and with the effective date of the Order changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

The following bench decision (corrected for errors of spelling, punctuation and transcription) is excerpted from the record of the hearing held July 21, 1993, in New York, New York.

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act of 1930, as amended at 7 U.S.C. § 499a *et seq.*, known as "the Act," the Regulations promulgated pursuant to the Act at 7 C.F.R. § 46.1*et seq.*, and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary at 7 C.F.R. § 1.130 *et seq.*

The proceeding was instituted by a Complaint filed on September 28, 1992, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that Respondent, The Norinsberg Corporation, violated section 2 of the Act at 7 U.S.C.

The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

§ 499b by failing to make full payment promptly of the agreed purchase prices for 46 lots of perishable agricultural commodities in the total amount of $424,913.75. Respondent filed an Answer on November 25, 1992, in which it denied violating the Act.

I presided over a hearing today, July 21, 1993. Complainant was represented by John P. Vos, Esq., Office of the General Counsel, U.S. Department of Agriculture of Washington, D.C. Respondent was represented by Leonard Kreinces of Great Neck, New York. After hearing the evidence and considering the applicable provisions of the law, I make the following findings of fact, conclusions of law and order.

Findings of Fact

1. Respondent, The Norinsberg Corporation, is a corporation organized and existing under the laws of the State of New York. Its business mailing address is 145 NYC Terminal Market, Bronx, New York 10474.

2. Pursuant to the licensing provisions of the Act, License No. 760202 was issued to Respondent on August 12, 1975. This license has been renewed annually and is next subject to renewal on or before August 12, 1993.

3. During the period from April 1991 through February of 1992, Respondent purchased, received and accepted 46 lots of perishable agricultural commodities from 10 sellers. Many, if not all, of these sales were in interstate commerce. Respondent failed to make payment promptly of the agreed purchase prices of the balances in the total amount of $424,913.75. The names of these sellers and the amounts purchased are accurately set forth in the schedule included at pages 3 and 4 of the Complaint and are supported in the exhibits submitted by Complainant at CX-2 through 11.

4. Since making these purchases and since the Complaint was filed, Respondent has paid in full Krass Joseph, Inc., and Vermont Apple Orchards.

5. There remains unpaid, by Respondent's admission as set forth in RX 39 to the remaining eight sellers, at least $255,081.12. Complainant's witness, Ms. Clare Jervis, testified that the total still owed was approximately $255,000 or substantially similar to the amount that Respondent set forth in RX 39.

6. Respondent has entered into agreements to pay other sellers and Respondent has also submitted letters from many of these sellers asking that the Department not revoke its license. Respondent has satisfied and settled reparation cases, and reparation cases which were brought against Respondent by many of these sellers, have been dismissed.

7. Respondent, at present, has made efforts to pay its creditors promptly and there is not evidence to indicate that it is not dealing with its creditors promptly at present and in good faith.

8. Respondent's difficulties were caused in part by the recession which caused financial problems, as well as by difficulties with lending institutions.

Conclusion of Law.

The acts of Respondent, in failing to make full payment promptly of the agreed purchase prices for 46 lots of perishable agricultural commodities that it purchased, received and accepted, as set forth in the Complaint, constitute wilful, flagrant and repeated violations of Section 2 of the Act at 7 U.S.C. §499b.

Discussion

The Act was enacted to regulate and control the handling of fresh fruits and vegetables, 71 Cong. Rec. S2163 (May 29, 1929). Its passage was occasioned by the severe losses that

shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers and brokers. H.R. Rep. No. 1041, 71st Cong., 2d Sess. (1930).

Its primary purpose was to provide a practical remedy to small farmers and growers who are vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *Chidsey v. Guerin*, 443 F.2d 584 (6th Cir. 1971); *O'Day v. George Arakelian Farms, Inc.* 536 F.2d 856 (9th Cir. 1976). "Accordingly, certain conduct by commission merchants, dealers or brokers [was] declared to be unlawful, 7 U.S.C. § 499b." [*Id.* at 858.]

Enforcement is effectuated through a system of licensing with penalties for violation, H. Rep. No. 1041, 71st Cong., 2d Sess. (1930). See also *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

Section 2(4) of the Act at 7 U.S.C. § 499b(4) makes it unlawful, among other things, for any commission merchant, dealer or broker to fail to make full payment promptly of its obligations with regard to transactions involving perishable agricultural commodities made in interstate commerce.

"Full payment promptly" is defined by the Department at 7 C.F.R. § 46.2(aa)(5) as requiring payment of the agreed purchase prices for produce within 10 days after the day on which the produce is accepted.

William Addington III, formerly a marketing specialist with Complainant's PACA branch, testified that he investigated Respondent, and was provided with copies of all of its records, including records of its accounts payable.

Mr. Addington found extensive evidence the Respondent failed to make full payment promptly to the sellers of produce and the agreed purchase prices in the total amount of $424,913.75 for 46 lots of perishable agricultural commodities which is purchased, received and accepted in interstate com-

merce during the period of April 1991 through February 1992, as alleged in the Complaint, and this is supported by the exhibits of Complainant, CX 2 through 11.

Ms. Clare Jervis, a senior marketing specialist with Complainant's PACA branch, testified that she conducted a follow-up investigation prior to the hearing, in early July 1993, by calling the produce sellers and inquiring about the status of their claims against Respondent. She discovered that approximately $250,000 was still unpaid and this is confirmed by Respondent in its exhibit, RX 39.

Respondent's failures to make timely payments, as alleged in the Complaint, violate section 2 of the Act at 7 U.S.C. § 499b. *Atlantic Produce [Co.]*, 35 Agric. Dec. 1631 (1976), *aff'd mem* 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978).

Moreover, Respondent's failures to pay promptly and in full for these transactions constitute repeated and flagrant violations of section 2 of the Act. *American Fruit Purveyors [, Inc.] v. United States*, 630 F.2d 370, 373-74 (5th Cir. 1980) [*cert. denied*, 450 U.S. 997 (1981)]; *G. Steinberg & Son, Inc.* 32 Agric. Dec. 236 (1973) *aff'd sub nom. George Steinberg & Son, Inc. v. Butz, supra*, 491 F.2d at 988.

The violations are repeated because they occurred 46 times. The violations are flagrant because of the number of violations, the amount of money involved and the length or period of time during which the violations occurred. *Veg-Mix, Inc.*, 48 Agric. Dec. 595 (1989).

The violations were also wilful. A wilful violation is one irrespective of evil motive or erroneous advice, if a person intentionally does an act prohibited by a statute, or if a person carelessly disregards requirements of the statute. Respondent knew, or it should have known that it could not make prompt payment of the large amount of perishable commodities it ordered, yet Respondent continued to make purchases. Respon-

dent should have made sure that it had sufficient capitalization with which to operate. It did not, and consequently could not pay its suppliers. Under the circumstances, Respondent has both intentionally violated the Act and clearly operated in careless disregard of the payment requirements of the Act, and Respondent's violations were therefore wilful. *Atlantic Produce, supra, 35* Agric. Dec. at 1631; *Rudolph John Kafcsak*, 39 Agric. Dec. 683 (1980), *aff'd mem.*, 673 F. 2d 1329 (6th Cir. 1981).

The transactions were in interstate commerce as alleged. The sales to Haas, Chinook and Ridgeway clearly were out-of-state deliveries, and with respect to the other apples, the apples originated from out of state and I find that the transactions do qualify for transactions in interstate commerce.

Mr. Kreinces has made a very eloquent argument and he has presented very impressive evidence. The evidence included evidence to show that Respondent has satisfied trust notices; that it has settled reparation cases; that it is presently in compliance with the Act in that it has not failed to pay any additional suppliers with respect to additional transactions; that it is, at present, making efforts to pay its suppliers promptly and pay in cash; that it has incurred financial difficulties with respect to obtaining credit and with respect to banks, which caused its failure to make these payments promptly; that it has entered into agreements with the eight suppliers listed in the Complaint who have not yet been paid, in order to pay them; that it is in the process of paying these suppliers according to payment schedules; that it has paid two of the suppliers in full; that the record includes correspondence from the creditors to the Department asking that the license of Respondent not be revoked; that there is no evidence that any of these sellers has suffered actual harm [other than the lengthy delay in receiving payment,] as contrasted with the potential for harm resulting from the nonpayment; and that if Respondent's license is revoked, these creditors

may be harmed a good deal in that their bills may not be paid, whereas they might be paid if the license was not revoked. All these factors have been adduced on the record very effectively by Respondent's counsel.

Nevertheless, I have to follow the precedents of this agency and despite any personal sympathies which I may have for Respondent, and despite how impressed I might personally be with their good faith efforts to correct an unfortunate situation, I am bound to revoke Respondent's license. I have no alternative but to follow the precedents of this agency. And those precedents state that where, at the time of the hearing, a Respondent has not fully paid the amounts not paid, the license must be revoked. And those cases include *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989). They include the *Carpenito Brothers, Inc.*, decision which was decided in 1987 [*,In re Carpenito Bros., Inc.* 46 Agric. Dec. 486 (1987), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988) (Table) (text in WESTLAW)], in which it was held that full payment must be made by the opening of the hearing and it has been held that an agreement to pay and a plan to pay, an installment agreement, does not constitute full payment — that full payment must be payment in full, not promises to pay in full.

And there are a number of cases to this effect. There is the *Lloyd Myers* case, a [19[92] case, PACA Docket No[s]. [D-88-547,] D-89-539 [, *In re Lloyd Myers Co.*, 51 Agric. Dec. 747 (1992), *appeal docketed*, No. 92-70587 (9th Cir. Aug. 18, 1992)]. There's the *R.H. Produce* case, a 1984 case [*,In re R.H. Produce, Inc.*, 43 Agric. Dec. 511 (1984)], and many, many cases, all of which say the same thing. There's the *Melvin Beene [Produce Co.]* case, 41 Agric. Dec. 2422 (1982) [*,aff'd* 728 F.2d 347 (6th Cir. 1984)], and the *Gilardi Truck & Transportation, Inc.*, decision, 43 Agric. Dec. 118 (1984). All of these decisions say — and this is the agency's position which I am bound to

follow — that if payment is not made as of the time of hearing, the Respondent's license must be revoked.

I make the following order.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

This case is governed by numerous precedents, summarized in *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989), attached as an Appendix to this Decision. Since Respondent violated express requirements of the Act (7 U.S.C.§ 499b(4)) and regulations (7 C.F.R § 46.2(aa)) by failing to make full payment promptly, the ALJ's finding of wilfulness is correct. *See Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 643-53, slip. op. at 57-72 (1989). A violation is willful, within the meaning of the Administrative Procedure Act (5 U.S.C. § 558(c)), if a person carelessly disregards regulatory requirements.[3] Even under the stricter standard followed in some circuits,[4] Respondent's conduct would still be willful in view of its blatant disregard of express regulations requiring prompt payment.

Similarly, the ALI's finding that Respondent's violations were "repeated" is correct. *See Reese Sales Co. v. Hardin 278*

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[3] *See Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 186-88 (1973); *Cox. v. USDA*, 925 F.2d 1102, 1105 (8th Cir.) *cert. denied*, 112 S.Ct. 178 (1991); *Finer Goods Sales Co. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960).

[4] *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079-81 (4th Cir. 1991); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th cir. 1965). *See also Parchman v. USDA*, 852 F.2d 858, 864-65 (6th Cir. 1988).

458 F.2d 187 (9th Cir. 1972); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 610 n.6 (3d Cir. 1960). *See also United Fruit & Veg. Co. v. Director of Fruit & Veg. Div.*, 668 F.2d 983, 983-85 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982).

In addition, the ALJ's finding that Respondent's violations were "flagrant" is correct, since it has repeatedly been held that failures to pay promptly and in full (in amounts that are not *de minimis*) are "flagrant" irrespective of legitimate business problems that caused such failures.[5] Specifically, Respondent's financial problems occurred when the Bank of Boston took over the Bank of Vermont, which had loaned about $4 million to some of Mr. Norinsberg's non-regulated businesses. The Bank of Boston called all of the loans made by the Bank of Vermont, and, near the end of 1990. Mr. Norinsberg, president and 85% stockholder of Respondent (Tr. 140, 179),[6] borrowed $2 million from a bank in New York and took the rest from Respondent's funds and personal funds to pay off the Bank of Vermont's loans. (Tr. 142-43, 180-82.) This left Respondent's operating capital "quite" impaired (Tr. 143; and see Tr. 182). Mr. Norinsberg tried to obtain overall financing in 1991 from World Tri-Vest, Inc. (Tri-Vest), but Tri-Vest was "closed" by the FBI "as a nationwide scam" (Tr. 150; and see Tr. 144-49, 183).

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[5] *See, e.g. Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 611 n.7 (1989); *In re Finer Goods Sale Co.*, 41 Agric. Dec. 1154, 1169-70 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983; *In re Wayne Cusimano, Inc.* 40 Angric. Dec. 1154, 1156-57 (1981), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 403 (1981), *aff'd*, 668 F.2d 983 (8th Cir. *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112-13 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 747 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

[6] Mr. Norinsberg gave 15% of Respondent's stock to his son (Tr. 140-41).

Notwithstanding Mr. Norinsberg's unfortunate experiences with the Bank of Boston and Tri-Vest, Respondent's violations would not have occurred if Mr. Norinsberg had not stripped Respondent of its capital in an effort to save non-regulated business enterprises. In that respect, Respondent's financial violations were directly caused by activities of Respondent's president and 85% stockholder, which impaired Respondent's capital for the benefit of non-regulated enterprises. Furthermore, when Respondent realized that it could not meet the prompt payment requirements, it was required to obtain written agreements from its suppliers for an extension of the prompt payment requirements before purchasing additional produce. Instead, Respondent obtained no such agreements and Respondent continued to purchase produce over a 10-month period, without meeting the prompt payment requirements. As stated in *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.), *cert. denied*, 289 U.S. 835 (1967), *cited in Caito, supra*, 48 Agric. Dec. at 622, slip op. at 28:

> [I]t is inconceivable that petitioners were unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of the Commodities Act. It would be hard to imagine clearer examples of "flagrant" violations of the statute than were exemplified by petitioners' conduct.

Respondent contends that the ALJ erred in issuing a bench decision, but there was no impropriety in that respect. The Rules of Practice provide (7 C.F.R. § 1.142(c)(1)):

> (c) *Judge's decision.* (1) The Judge may, upon motion of any party or in his or her own discretion, issue a decision orally at the close of the hearing, or within a reasonable time after the closing of the hearing.

Respondent relies on the fact that Complainant filed a motion for a bench decision on July 9, 1993, 12 days before the

hearing, which was not received by Respondent until 9 or 10 days before the hearing. The Rules of Practice permit 20 days for responding to any motion, "or within such shorter or longer period as may be fixed by the Judge or the Judicial Officer" (7 C.F.R. § 1.143(d)). The ALJ did not abuse his discretion in requiring Respondent to respond to the motion at the hearing (Tr. 207-12), or in issuing the bench decision, which he could have done even without a motion. It was particularly appropriate to issue a bench decision in this case because, under the undisputed facts, the ALJ was required by settled precedents to revoke Respondent's license. Any request for a change in that settled policy would have to be made to the Judicial Officer, which Respondent has done on appeal. It would have been improper for an ALJ to fail to follow settled Department case law. *In re Harris*, 50 Agric. Dec. 683, 711-18 (1991) (Ruling on Certified Questions).

Respondent further contends that the ALJ erred in refusing to turn over the investigative file of Ms. Jervis, who reviewed the records of Respondent's violations obtained by another employee of the Department. The ALJ reviewed the investigative file *in camera*, and refused to give it to Respondent because it was an internal agency analysis of the evidence obtained by another investigator (Tr. 108-11). The ALJ's ruling was correct. *See In re Machado* (Decision as to Respondent Cozzi), 42 Agric. Dec. 820, 822-66 (1983) (remand order), *final decision*, 42 Agric. Dec. 1454 (1983), *aff'd*, 749 F.2d 36 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). An "investigative file consist[ing] primarily of records and documents, as well as brief memoranda explaining these documents," is not a "statement" of investigating agents "under the Jencks Act." *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 923 (9th Cir. 1987). In addition, since there is no real dispute as to Respondent's failures to pay promptly, even if there had been error in this

respect, which there was not, the error would have been harmless. *See Blackfoot, supra*, 810 F.2d at 923.

Respondent also argues that it has entered into consent settlements with its creditors, under which Respondent will continue to make payments to all creditors, and that all reparation complaints filed by creditors have been dismissed. However, the regulations expressly require that any agreements for deferred payment must be entered into before the produce is purchased. *Caito, supra*, 48 Agric. Dec. at 604-10, slip op. at 5-13; 7 C.F.R. § 46.2(aa)(11). The dismissal of the reparation cases is irrelevant in this disciplinary proceeding.

Turning to the sanction, the Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, No. 91-70169 (9th Cir. Apr. 23, 1993) (Table) (text in WESTLAW) (not to be cited as precedent under 9th Circuit Rule 36-3), as follows:

> It is appropriate to state expressly the practice that has been followed by the Judicial Officer in recent cases, *viz.*, that reliance will no longer be placed on the "severe" sanction policy set forth in many prior decisions, e.g., *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. 268, 435-62 (1987), *aff'd on other grounds*, 841 F.2d 1451 (9th Cir. 1988). Rather, the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Clare Jervis, Senior Marketing Specialist, PACA Branch, United States Department of Agriculture, expressed the Depart-

ment's recommendation that Respondent's license be revoked, stating (Tr. 93-96):

> A. We are seeking the revocation of the license for the Norinsb[e]rg Corporation.
>
> Q. Is this sanction consistent with sanctions imposed in other cases, where the allegations are similar to this?
>
> A. Yes.
>
> Q. What factors were considered in fashioning this sanction by the Department?
>
> A. We look at several factors: the number of violations, the dollar amount, the time period and the effect of these types of violations, failures to pay, upon the industry.
>
> In this particular case, the Norinsb[e]rg Corporation, based upon the Mr. Addington's investigation, and my review, failed to pay ten sellers for 46 lots of produce, a dollar amount totalling about $424,000.
>
> The period that the transactions occurred were April of 1991 through February of 1992, and as I testified earlier, although they have made some payments for this debt, they still owe approximately $276,000 for transactions that occurred through 1991 and into 1992.
>
> Q. What is the effect of these types of violations on the industry?
>
> A. The effect of these types of violations upon the industry is very — it can be a serious effect. The produce industry is a very unique industry and this is the result of the commodities, fruits and vegetables, which have a very short shelf life, and as a result,

they have to move from the growing areas rapidly, over thousands of miles, to reach the consumer, at the height of its edible appeal.

As a result of the fast nature in which the produce must be shipped, the industry relies upon what we refer to as a trust relationship with each other. The buyers — or I should say the shippers and the buyers make their transactions based upon a few phone calls, without having the opportunity to meet each other or perform extensive credit checks that are so common in other industries.

So, as a result, they are trusting, based upon a few phone calls, that each party will perform in accordance with the contract.

The shipper/supplier trusts that the buyer will receive the produce and make prompt sales and remit in accordance with the contract terms.

The buyer, on the other hand, trusts that the shipper will ship the quality and quantity of the produce it ordered, in order to meet its customers' demands.

This trust relationship is what the industry relies upon in the marketing chain of the produce.

Q. And if this marketing chain breaks down, what happens?

A. When the marketing chain breaks down, specifically with failures to make full payment, the trust relationship is broken in the industry. In other words, if A fails to pay B, B is under hardship to pay C. It's what we refer to as a domino or ripple effect throughout the industry.

Q. And what is your understanding of the role of the secretary of Agriculture in maintaining this trust relationship between buyers and sellers of the produce industry.

A. My understanding is that the Secretary is charged with enforcing the PACA and thereby insuring that the industry is able to operate on this trust relationship.

The Secretary, by issuing a PACA license to a produce firm, is making a statement to the industry that this firm is financially responsible, and that firm will operate in accordance with the PACA.

Second, the Secretary, by imposing sanctions for failure to make full payment promptly, is making a statement to the industry that if a firm buys produce and fails to pay for the produce, then that firm will be held accountable. Violations won't be tolerated.

And the net effect of the Secretary's imposing sanctions is that it serves as a deterrent to the entire produce industry. It's a very strong message that the Secretary will prosecute violations whenever and wherever they occur. And it serves as an indication to the entire industry as to what the consequences are for failing to make full payment promptly or in violating the Act.

Q. And as far as equal treatment of other licensees, what effect does it have?

A. Equal treatment, the Secretary in imposing sanctions on produce firms in the industry, these sanctions are imposed through even-handed enforcement by the Secretary, and as a result, I had said just a few minutes ago, that it provides the trust — it enables [an entity] to operate in this trust relationship. In other words, it gives them a level playing field for all parties to transact.

Respondent argues that there is no proof of actual harm to any creditor from Respondent's late payments, but Ms. Jervis testified that the failure to promptly pay the amounts of money involved in this case to produce firms "would hurt any produce firm" (Tr. 189). She further testified that, of the 10 sellers who did not receive prompt payment from Respondent, only one is currently dealing with Respondent, and that one requires payment in advance (Tr. 186, 188, 205).

In the present case, there is no showing that Respondent's creditors will not be paid in full even if Respondent's license is revoked, since, under the terms of the settlement agreements, Mr. Norinsberg personally guaranteed the payments. But even if various creditors would not be paid if Respondent's license is revoked, as stated in *Caito, supra*, 48 Agric. Dec. at 628, slip. op. at 38, "[i]f lenient sanctions were imposed in the case of serious and flagrant violations of the Act for the benefit of a few of a particular respondent's creditor, the sanctions would not have a strong deterrent effect and, therefore, such a policy would be contrary to the public interest."

Respondent's argument that the sanction should be mitigated because Respondent has been paying promptly since May 1992, and that Respondent's creditors will ultimately be paid in full, overlooks the fact that the regulations expressly required Respondent to pay promptly from the beginning, and Respondent's creditors were required to wait several years for full payment (assuming full payment is ultimately made). Moreover, as stated above, Respondent's financial difficulties occurred because Mr. Norinsberg stripped the capital from this regulated business in order to save his non-regulated businesses. The settled policy of revoking the violator's license in this type of case has been well received by the produce industry, and tends to achieve the congressional purpose in enacting this remedial program. *See Caito, supra*, 48 Agric. Dec. at 614-25, slip op. at 18-33.

For the foregoing reasons, the following Order should be issued.

Order

Respondent has committed wilful, flagrant and repeated violations of§ 2(4) of the Act (7 U.S.C. § 499b(4)). Therefore, pursuant to § 8(a) of the Act (7 U.S.C. § 499(a)h). Respondent's license is revoked.

This order shall take effect 30 days after service of this Decision and Order on Respondent.

Done at Washington, D.C.

September 24, 1993

/s/ Donald A. Campbell
Donald A. Campbell
Judicial Officer

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re: The Norinsberg Corporation,

Respondent

PACA DOCKET NO. D-92-571

RECEIVED
U.S. DEPT OF AGR.
AUG 9, 1993
The Hearing Clerk
OALJ

Decision And Order

The following bench decision (corrected for errors of spelling, punctuation and transcription) is excerpted from the record of the hearing held July 21, 1993, in New York, New York.

This is a disciplinary proceeding brought pursuant to the provision of the Perishable Agricultural Commodities Act of 1930, as amended at 7 U.S.C. § 499a, *et seq.*,known as "the Act," the Regulations promulgated pursuant to the Act at 7 C.F.R. §§ 46.1 *et. seq.*, and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary at 7 C.F.R. §§ 1.130, *et seq.*

The proceeding was instituted by a Complaint filed on September 28, 1992, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that Respondent, the Norinsberg Corporation, violated section 2 of the Act at 7 U.S.C. § 499b by failing to make full payment promptly of the agreed purchased prices for 46 lots of perishable agricultural commodities in the total amount of

$424,913.75. Respondent filed an Answer on November 25, 1992, in which it denied violating the Act.

I presided over a hearing today, July 21, 1993. Complainant was represented by John P. Vos, Esq., Office of the General Counsel, U.S. Department of Agriculture of Washington, D.C. Respondent was represented by Leonard Kreinces of Great Neck, New York. After hearing the evidence and considering the applicable provisions of the law, I make the following findings of fact, conclusion of law and order.

Findings of Fact

1. Respondent, The Norinsberg Corporation, is a corporation organized and existing under the laws of the state of New York. Its business mailing address is 145 NYC Terminal Market, Bronx, New York 10574.

2. Pursuant to the licensing provision of the Act, License No. 760202 was issued to Respondent on August 12, 1975. This license has been renewed annually and is next subject to renewal on or before August 12, 1993.

3. During the period from April 1991 through February of 1992, Respondent purchased, received and accepted 46 lots of perishable agricultural commodities from 10 sellers. Many, if not all, of these sales were in interstate commerce. Respondent failed to make payment promptly of the agreed purchase price of the balances in the total amount of $424,913.75. The names of these sellers and the amounts purchased are accurately set forth in the schedule included at page 3 and 4 of the Complaint and are supported in the exhibits submitted by Complainant at CX-2 through 11.

4. Since making these purchases and since the Complaint was filed, Respondent has paid in full Krass Joseph, Inc., and Vermont Apple Orchards.

5. There remains unpaid by Respondent's admission as set forth in RX 39 to the remaining eight sellers at least $255,081.12. Complainant's witness, Ms. Clare Jervis, testified that the total still owed was approximately $255,000 or substantially similar to the amount that Respondent set forth in RX 39.

6. Respondent has entered into agreements to pay other sellers and Respondent has also submitted letters from many of these sellers, asking that the Department not revoke its license. Respondent has satisfied and settled reparation cases, and reparation cases which were brought against Respondent by many of these sellers have been dismissed.

7. Respondent, at present, has made efforts to pay its creditors promptly and there is not evidence to indicate that it is not dealing with its creditors promptly at present and in good faith.

8. Respondent's difficulties were caused in part by the recession which caused financial problems, as well as by difficulties with lending institutions.

Conclusion of Law

The acts of Respondent, in failing to make full payment promptly of the agreed purchase prices for 46 lots of perishable agricultural commodities that it purchased, received and accepted, as set forth in the Complaint, constitute willfull, flagrant and violations of Section 2 of the Act at 7 U.S.C. Section 499b.

Discussion

The Act was enacted to regulate and control the handling of fresh fruits and vegetables, 71 Cong. Rec. §S2163, (May 29, 1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers and brokers. H.R. Rep, 1041, 71st Cong., 2d Sess. (1930).

Its primary purpose was to provide a practical remedy to small farmers and growers who are vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *Chidsey v. Guerin*, 443 F.2d 584, (6th Cir. 1971); *O'Day v. George Arakelain Farms, Inc.*, 536 F.2d 856 (9th cir. 1976). " Accordingly, certain conduct by commission merchants, dealers or brokers was declared to be unlawful, 7 U.S.C. § 499b."

Enforcement is effectuated through a system of licensing with penalties for violation, H. Rep 1041, 71st Cong., 2d Sess. (1930). Also, *George Steinberg and Son, Inc. V. Butz.* 491 F.2d 988 (2d Cir.) *cert. denied*,, 419 U.S. 830 (1974).

Section 2(4) of the Act at 7 U.S.C. § 499b (4) makes it unlawful, among other things, for any commission merchant, dealer or broker to fail to make full payment promptly of its obligations with regard to transactions involving perishable agricultural commodities made in interstate commerce.

"Full payment promptly" is defined by the Department of 7 C.F.R. § 46.2 (aa)(5) as requiring payment of the agreed purchase prices for produce within 10 days after the day on which the produce is accepted.

William Addington, III, formerly a marketing specialist with Complainant's PACA branch, testified that he investigated Respondent, and was provided with copies of all of its records of its accounts payable.

Mr. Addington found extensive evidence the Respondent failed to make full payment promptly to the sellers of produce and the agreed purchase prices in the total amount of $424,913.75 for 46 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce during the period of April 1991 through February 1992, as alleged in the Complaint, and this is supported by the exhibits of Complainant, CX 2 through 11.

Ms. Clare Jervis, a senior marketing specialist with Complainant's PACA branch, testified that she conducted a follow-up investigation prior to the hearing, in early July 1993 by calling the produce sellers and inquiring about the status of their claims against Respondent. She discovered that approximately $250,000 was still unpaid and this is confirmed by Respondent in its exhibit, RX 39.

Respondent's failure to make timely payments, as alleged in the Complaint, violate section 2 of the Act at 7 U.S.C. § 499b. Atlantic Produce, 35 Agric. Dec. 1631 (1976), *aff'd mem.* 568 F.2d 772, (4th Cir.), *cert. denied*,, 439 U.S. 819 (1978).

Moreover, Respondent's failures to pay promptly and in full for these transactions constitute repeated and flagrant violations of section 2 of the Act. *American Fruit Purveyors. v. United States*, 630 F.2d 370 at 373-374 (5th Cir. 1980); *G. Steinberg and Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd sub nom. George Steinberg and Son, Inc. v. Butz, supra*, 491 F.2d 988.

The violations are repeated because they occurred 46 times. The violations are flagrant because of the number of violations, the amount of money involved and the length or period of time during which the violations occurred. *Veg. Mix, Inc.* 48 Aric. Dec. 595 (1989).

The violations were also wilful. A wilful violation is one irrespective of evil motive or erroneous advice, if a person intentially does an act prohibited by a statute, or if a person carelessly disregards requirements of the statute. Respondent knew, or it should have known, that it could not make prompt payment for the large amount of perishable commodities it ordered yet Respondent continued to make purchases. Respondent should have made sure that it had sufficient capitalization with which to operate. It did not, and consequently could not pay its suppliers. Under the circumstances, Respondent has both intentially violated the Act and clearly operated in careless

disregard of the payment requirements of the Act and Respondent's violations were therefore willful. *Atlantic Produce, supra,* 35 Agric. Dec. 1631 (1976); *Rudolph John Kafcsak,* 39 Agric. Dec. 683 (1980), *aff'd mem.* 673 F.2d 1329 (6th Cir. 1981).

The transactions were in interstate commerce as alleged. The sales to Haas, Chinook and Ridgeway clearly were out-of-state deliveries and with respect to the other apples, the apples originated from out of state and I find that the transactions do qualify for transactions in interstate commerce.

Mr. Kreinces has made a very eloquent argument and he has presented very impressive evidence. The evidence included evidence to show that Respondent has satisfied trust notices; it has settled reparation cases, that it is presently in complaince with the Act in that it has not failed to pay any additional suppliers with respect to additional transactions; that it is, at present, making efforts to pay its suppliers promptly and pay in cash; that it has incurred financial difficulties with respect to obtaining credit and with respect to banks, which caused its failure to make these payments promptly; that it has entered into agreements with the eight supplies listed in the Complaint who have not yet been paid, in order to pay them; that it is in the process of paying these suppliers according to payment schedules; that it has paid two of the suppliers in full; that the record includes correspondence from the creditors to the Department asking that the license of Respondent not be revoked; that there is no evidence that any of these sellers have suffered actual harm as contrasted with the potential for harm resulting from the nonpayment; and that if Respondent's license is revoked, these creditors may be harmed a good deal in that their bills may not be paid whereas they might be paid if the license was not revoked. All these factors have been adduced on the record very effectively by Respondent's counsel.

Nevertheless, I have to follow the precedents of this agency and despite any personal sympathies which I may have for Respondent, and despite how impressed I might personally be with their good faith efforts to correct an unfortunate situation, I am bound to revoke Respondent's license. I have no alternative but to follow the precedents of this agency. And those precedents state that where, at the time of the hearing, a Respondent has not fully paid the amounts not paid, the license must be revoked. And those cases include *In re Caito Produce*, 48 Agric. Dec. 602 (1989). They include the *Carpenito Brothers, Inc.* decision which was decided in 1987, in which it was held that full payment must be made by the opening of the hearing and it has been held that an agreement to pay and a plan to pay, an installment agreement, does not constitute full payment — that full payment must be payment in full, not promises to pay in full.

And there are a number of cases to this effect. There is the *Lloyd Meyers* case, a 1987 case, PACA Docket No. D-89-539. There's the *RH Produce* case, a 1984 case, and many, many cases, all of which say the same thing. There's the *Melvin Beene* case, 41 Agric. Dec. 2422 (1982), and the *Gilardi Truck and Transportation decision*, 43 Agric. Dec. 118 (1984). All of these decisions say—and this is the agency's position which I am bound to follow — that if payment is not made as of the time of hearing, the Respondent's license must be revoked.

I make the following order:

Order

A finding is made that the Respondent has committed wilful, flagrant and repeated violations of section 2 of the Act, at 7 U.S.C. § 499b, and that Respondent's license is revoked. This Order shall take effect on the 11th day after this decision becomes final.

Pursuant to Rule of Practice 1.145, this decision will become final without further proceedings 35 days from the date of this hearing. A copy will be served upon Respondents, but the time for appeal runs from 30 days after the issuance of this decision, and the issuance of this decison is today.

Written copies of this decision and order are being provided to the parties in accordance with § 1.142(c)(2) of the Rules of Practice.

EDWIN S. BERNSTEIN
Adminsitrative Law Judge

August 9, 1993

JERVIS

MR. VOS: I call Clare Jervis to the stand.

Whereupon,

CLARE JERVIS

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE BERNSTEIN: Please state your full name and address.

THE WITNESS: Clare Jervis, C-L-A-R-E, Jervis is J as in John, E-R, V as in Victor, I-S. My address is 14th and Independence Avenue, S.W., Washington, D.C. 20250.

JUDGE BERSTEIN: Thank you.

DIRECT EXAMINATION

BY MR. VOS:

Q. And, Ms. Jervis, by whom are you employed?

A. United States Department of Agriculture, Food and Vegetable Division, PACA Branch.

Q. What is your position and title with the PACA Branch?

A. I'm a marketing specialist, senior marketing specialist with the branch.

Q. And what is your educational background?

A. I have a bachelor of science in marketing management from Virginia Tech which is located in Blacksburg, Virginia.

Q. And how long have you been a marketing specialist for the Department of Agriculture?

A. Approximately 11 and a half years.

Q. As a senior marketing specialist, what are your duties?

A. I conduct investigations of produce firms to determine whether violations of the Act are occurring.

My job duties also include the review of investigations and accompaying evidence, that are conducted by investigators located in various field offices.

Based upon my review and analysis of the records, I participate in a recommendation made to the records, I participate in a recommendation made to the chief of the branch as to what appropriate sanction might be taken against the firm.

Q. And are you then familiar with the discipline filed agains the Norinsberg Corporation?

A. Yes.

BY MR. VOS:

Q. According to your calculations, then, based on these phone calls, what amount does the Norinsberg Corporation still owe for produce that is purchased and received in interstate commerce?

A. It totals approximately $276,000.

Q. In Paragraph 4 of the complaint that was filed in this matter, there are allegations that the Norinsberg Corporation failed to pay promptly for perishable agricultural commodities that it received and accepted in interstate commerce.

Based on the testimony and the documents that you reviewed, does the Agency have a position

with regard to an appropriate sanction against the Norinsberg Corporation?

A. Yes.

Q. What sanction does the administration think would be appropriate in this situation?

A. We are seeking the revocation of the license for the Norinsberg Corporation.

Q. Is this sanction consistent with sanctions imposed in other cases, where the allegations are similar to this?

A. Yes.

Q. What factors were considered in fashioning this sanction by the Department?

A. We look at several factors: the number of violations, the dollar amount, the time period and the effect of these types of violations, failures to pay, upon the industry.

In this particular case, the Norinsburg Corporation, based upon Mr. Addington's investigation, and my review, failed to pay ten sellers for 46 lots of produce, a dollar amount totalling about $424,000.

The period that the transactions occurred were April of 1991 through February of 1992, and as I testified earlier, although they have made some payments for this debt, they still owe approximately $276,000 for transaction that occurred through 1991 and into 1992.

Q. What is the effect of these types of violations on the industry?

A. The effect of these types of violations upon the industry is very — it can be a serious effect. The produce industry is a very unique industry and this is

the result of the commodities, fruits and vegetables, which have a very short shelf life, and as a result, they have to move from the growing areas rapidly, over thousands of miles, to reach the consumer, at the height of its edible appeal.

As a result of the fast nature in which the producer must be shipped, the industry relies upon what we refer to as a trust relationship with each other. The buyers — or I should say the shippers and the buyers make their transactions based upon a few phone calls, without having the opportunity to meet each other or perform extensive credit checks that are so common in other industries.

So, as a result, they are trusting, based upon a few phone calls, that each party will perform in accordance with the contract.

The shipper/supplier trusts that the buyer will receive the produce and make prompt sales and remit in accordance with the contract terms.

The buyer, on the other hand, trusts that the shipper will ship the quality and quantity of the produce it ordered, in order to meet its customer's demands.

This trust relationship is what the industry relies upon in the marketing chain of the produce.

Q. And if this marketing chain breaks down, what happens?

A. When the marketing chain breaks down, specifically with failures to make full payment, the trust relationship is broken in the industry. In other words, if A fails to pay B, B is under hardship to pay C. It's what we refer to as a domino or ripple effect throughout the industry.

Q. And what is your understanding of the role of the Secretary of Agriculture in maintaining this trust relationship between buyers and sellers of the produce industry.

A. My understanding is that the Secretary is charged with enforcing the PACA and thereby insuring that the industry is able to operate on this trust relationship.

The Secretary, by issuing a PACA license to a produce firm, is making a statement to the industry that this firm is financially responsible, and that firm will operate in accordance with the PACA.

Second, the Secretary, by imposing sanctions for failure to make full payment promptly, is making a statement to the industry that if a firm buys produce and fails to pay for the produce, then that firm will be held accountable. Violations won't be tolerated.

And the net effect of the Secretary|s imposing sanctions is that it serves as a deterrent to the entire produce industry. It's a very strong message that the Secretary will prosecute violations whenever and wherever they occur. And it serves as an indication to the entire industry as to what the consequences are for failing to make full payment promptly, or in violating the Act.

Q. And as far as equal treatment of other licenses, what effect does it have?

A. Equal treatment, the Secretary, in imposing sanctions on produce firms in the industry, these sanctions are imposed through even-handed enforcement by the Secretary, and as a result, I had said just a few minutes ago, that it provides the trust — it en-

ables it entry to operate in this trust relationship. In other words, it gives them a level playing field for all parties to transact.

JERVIS

CROSS-EXAMINATION

BY MR. KREINCES:

Q. Ms. Jervis, you have no other documents other than what Mr. Addington had in considering whether there was interstate commerce; is that correct?

A. Yes.

Q. You had the same exhibits that we've seen this morning?

A. Yes.

Q. You've indicated to us that the sanction that the Complaint is seeking in this matter is revocation. Is that your decision?

A. No, I participated in a recommendation to the chief of the branch.

Q. Who were the other participants?

A. It would be my supervisor, Jane Survais and the assistant chief and —

Q. What's his name?

A. James Frazier, and then, of course, this recommendation is made to the chief of the branch, who is John Flannagan.

Q. And did Mr. Flannagan refer to anyone else himself in making the decision?

A. I'm not in his office when he makes his decision. I know that there are time when they hold a meeting — that my supervisor, James Frazier, and John Flannagan hold a meeting to discuss whether

our recommendation is appropriate and so — like I said, I know they do occasionally have meetings.

Q. Do you have a report here that you prepared, a written report?

A. No, I do not prepare a written report.

Q. Do you prepare anything in writing?

A. Basically an internal memo that my supervisor is the only person who can sign off on that.

Q. And the memorandum is not made by you in the regular course of business?

A. Well, you could say — yes, I make it in the regular course of business, with any case that's assigned to me.

Q. And it's the regular course of business for the Department of Agriculture to have that memorandum prepared; isn't that correct?

A. Yes.

Q. It's part of your function; isn't that correct?

A. Yes, that's correct.

MR. KREINCES: I call for the production of that memorandum.

JUDGE BERNSTEIN: Mr. Vos?

MR. VOS: I do not have a copy of that memorandum. Ms. Jervis, I believe you indicated you do not have a copy either?

THE WITNESS: It would be in the disciplinary file. I do not keep copies of those documents with me.

And, your Honor, as I — when I was testifying to Mr. Kreinces, it is an internal memorandum.

And it could almost say it's a pre-decisional type of thing, and I don't know if that's something that would be readily made avaialbe to counsel for a Respondent. It's something that I guest Mr. Vos would have to make a decison on, or the proper parties in Washington.

JUDGE BERNSTEIN: Did you make a statement in writing?

THE WITNESS: I prepared a memo to the file, reviewing — basically setting forth my review of the evidence, the results and —

JUDGE BERSTEIN: This was an analysis?

THE WITNESS: Yes, it's an analysis of the records.

JUDGE BERSTEIN: Does it contain any independent facts that you —

THE WITNESS: No, strictly — my memo to the file is strictly an analysis of the records.

JUDGE BERSTEIN: I see.

MR. KREINCES: I respectfully request that that document be provided to the Respondent, for the comment on it, should your Honor rule, at the end of this — the conclusion of this hearing, in our findings and conclusions, as opposed to what's before your Honor concerning a motion for a bench decision, or that we have a right to look at that document and possibly request further time in order to address Ms. Jervis in connection with it.

JUDGE BERSTEIN: Mr. Vos, what's your position with respect to that request?

MR. VOS: I believe Ms. Jervis has testified as to what she — what process she undertook with re-

gard to recommending this sanction. This document is purely her own work notes that she made and forwarded on to her supervisor. I do not believe they are available in this crisis and the Department cannot anticipate a request for every document that has ever been produced by the Department with regard to these cases, so I would object to that request, yes.

MR. KREINCES: I'm afraid that's one of the problems with the procedure, and that is not before your honor nor before me. But one of the problems with the procedure is that it has been ruled by the Judicial Officer of the Secretary that no common demand of Respondents is ever recognized.

So sending a demand for notice of discovery inspection, which we usually do under the Federal Rules in federal proceedings is not applicable here, is never recognized. All we do is get an exhibit list several weeks before trial.

JUDGE BERSTEIN: But it sounds to me as though this is an internal recommendation, rather than a statement. You would be entitled to a statement by her, but not internal recommendation.

MR. KREINCES: If, again, your Honor would have to see the document en camera in order to make an appropriate ruling, I respectfully so move. That's number one.

JUDGE BERSTEIN: Okay.

MR. KREINCES: And number two, I laid the foundation to show that's the regular course of business.

JUDGE BERNSTEIN: Again, I don't think she's testified as to any — well, she has testified

about conversations that she had with respect to the sellers' representatives.

MR. KREINCES: Yes, as set forth in the notes.

JUDGE BERNSTEIN: Was that included in your memorandum?

THE WITNESS: I'm sorry, I didn't understand.

JUDGE BERNSTEIN: Did your memorandum that we're discussing, did that memorandum refer to conversations that you had with respect to seller's representatives?

THE WITNESS: My July 1993 conversations? No, this memo that I prepared would have been prepared within a few months of Mr. Addington's investigation which was done in March of 1992.

JUDGE BERNSTEIN: Well, is it your testimony that — does the document contain any facts that you obtained?

THE WITNESS: My testimony is that my memorandum that we're talking about —

JUDGE BERNSTEIN: Yes.

THE WITNESS: — was an analysis of the facts Mr. Addington — with the documents Mr. Addington obtained during his investigation.

JUDGE BERNSTEIN: And you would like me to obtain that and review that, to determine whether that's in fact the case? Is that what you're suggesting?

MR. KREINCES: I would like you to review that document in order to determine whether I have a right to see it.

JUDGE BERNSTEIN: Mr. Vos?

MR. VOS: Yes, your Honor, if I may be heard on this. I think that Ms. Jervis is here — it's not that we're trying to hide something from Mr. Kreinces. I apologize if that's the impression he's gotten.

MR. KREINCES: Not at all.

MR. VOS: I think that Ms. Jervis is here to testify, and she's subject to cross-examination. If there's any problem that he has with recommendations that she made to her supervisors, she's here and he may ask her about that.

The point is, is that she can't bring all of her notes with her to these hearings, or she'd be carrying the entire office with her.

JUDGE BERNSTEIN: See, counsel for Respondent is entitled to see her statements.

MR. VOS: Correct.

JUDGE BERNSTEIN: And if these documents contain statements, then he's entitled to see them. And I can't tell that, because I don't have the documents before me. That's my dilemma.

MR. KREINCES: Are there any other documents, Ms. Jervis — if I may, your Honor — besides that document that you made for the file? Any current memorandum to the file?

THE WITNESS: No, I would only have prepared a memo to the file and then, if there were any updates to be done, such as phone calls that I've

done, I have those notes with me, but I wouldn't have personally prepared anything after that memo.

JUDGE BERNSTEIN: Can we do off the record?

(Whereupon, there was a discussion held off the record)

JUDGE BERNSTEIN: Back on the record.

Mr. Krinces has requested that I review the memoranda in question to determine if they contain any factual statements by the witness, or, as contended, are merely internal memoranda which contain recommendations.

If they contain facts, then those factual portions should be turned over for review by Mr. Kriences. If they're internal recommendations, those portions will not be turned over.

Therefore, I requested the witness and Mr. Vos to obtain by fax a copy of that — those documents so that I can review them following the lunch recess and determine which if any portions should be made available to Mr. Kriences.

MR. KREINCES: And if your Honor should, I respectfully submit, look at that statement with the view of whether there contains anything in that document which is at variance with the direct testimony of Ms. Jervis

We will recess at this time and we will reconvene here at 1:45.

Whereupon, a luncheon recess was taken.)

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(1:45 p.m.)

JUDGE BERNSTEIN: Back on the record.

Mr. Vos, you handed me three pages during the end of the recess. Tell me in summary what these three pages consist of. Is this any and all memoranda made by the witness? Ms. Jervis testified that she had some memoranda that she made.

Ms. Jervis, are these all your memoranda?

THE WITNESS: That's the memo to the file.

JUDGE BERNSTEIN: That's the memo to the file.

THE WITNESS: And the cover memo is kind of —

JUDGE BERSTEIN: Okay. So what I've been handed are three pages. There is a cover memo which was not written by Ms. Jervis, one page.

MR. VOS: Can I have its date, your Honor?

JUDGE BERSTEIN: The date — the typewritten memo itself does not have a date, but there appears some initials and then a handwritten date of July 14th, 1992.

Attached to that is a memo for the file which consist of one and one-half pages. Is that something that you generated?

THE WITNESS: Yes.

JUDGE BERSTEIN: Okay. There is an historical recount with respect to the investigation. Is this a memo based upon your personal investiga-

tion or this kind of a recount of other people's efforts?

THE WITNESS: This is an analysis of the documents Mr. Addington obtained in the investigation and initially, the beginning of the memo, we do like a license history, and then we go into — there's also a bit of history there about the number of reparation complaints have been in the file —

JUDGE BERNSTEIN: Yes.

THE WITNESS: — and based upon our — the department's data base, the number of trust notices that are filed.

JUDGE BERSTEIN: Right.

THE WITNESS: But everything else is strictly an analysis of the documents Mr. Addington obtained.

JUDGE BERNSTEIN: Yes.

THE WITNESS: Just setting forth the facts of the documents.

JUDGE BERNSTEIN: I don't think this is the type of memo that should be furnished to counsel pursuant to the Jenks Act. It seems to be more of an internal memo of analysis rather than a factual memo with respect to evidence that was personally obtained by this witness, and therefore I will not direct Complainant to make this available to counsel for Respondent. That's my ruling. So I return that to you.

MR. KREINCES: May I be heard, your Honor?

JUDGE BERSTEIN: Yes.

MR. KREINCES: Your Honor, I respectfully submit that I think that the Jenks Act applies

here. This is not a criminal proceeding. This is an administrative proceeding and I think that the testimony foundationally of Ms. Jervis to the effect that this document was made in the regular course of business is enough to qualify it as a document which I can see. If it's a compilation, I'm entitled to see it. If it varies at all with her testimony, I have a right to see it to determine whether it does or not.

It being a statement prepared by her in the regular course of business, I have a right to use it or not to use it to impeach her. And that is the reason why I have asked for it.

JUDGE BERNSTEIN: I understand your argument. The decisions of this agency as well as other agencies do indicate that the Jenks Act does apply to this type of case in that this is an enforcement proceeding, and yes, you would be entitled to that type of information.

Now, as far as our obtaining documentation merely because the documentation has been compiled by the agency in the regular course of business, perhaps you can obtain that under the Freedom of Information Act by making a request pursuant to that Act, but that is not what you've done here.

I would direct Complainant to make available to you a statement that it had made with respect to this substance of its direct testimony, but this is not tha type of writing. It's an internal agency analaysis which is used in connection with its preparation for its case, and as such, I cannot direct that this be made available to you.

MR. KREINCES: If I might just apprise your Honor of one thing, and I'm not arguing — in

another matter in which I made an infor IE request, I was told by the access officer and I was told by a member of the General Counsel involved in that case, that whatever documents are going to be given to me under the exhibits, those are the documents, they're the same documents, you see. And so it's only by being at a hearing and hearing testimony and asking the questions that we ascertain the existence of documents other than what's on the exhibit list.

JUDGE BERNSTEIN: Right. I understand your dilemma, Mr. Kreinces, and I understand your problem. However, I cannot make available to you all official documents of an agency, merely because you ask me to do that.

To the extent that you can obtain official documents of the agency through the Freedom and Information Act, that would be a separate matter. If you cannot, then with respect to this proceeding, I can only make available to you certain documentation, and I've already ruled that this is not a document which I ought to make available to you.

* * * * *

7 U.S.C. §499b (4)

Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce —

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involing any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction.

18U.S.C. §3500

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of supoena, discoer, or inspection until said witness has testified on direct examination in the trial of the case.

(B) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defend) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement related to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(C) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld form the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to

this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(D) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defedant any such statement, or such portion therof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its descretion shall determine that the interests of justic require that a mistrial be declared.

(E) The term "statement", as used in subjections (b), (c) and (d) of this section in relation to any witness called by the United States, means, —

(1) a written statement made by said witness ad signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however, taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

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No. 95-243

In the Supreme Court of the United States

OCTOBER TERM, 1995

NORINSBERG CORPORATION, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a regulation incorporating the standards of the Jencks Act, 18 U.S.C. 3500, required the Department of Agriculture to produce a memorandum prepared by a Department employee who testified at an administrative hearing.

2. Whether the court of appeals erred in holding that nondisclosure by the Department of certain statements covered by the standards of the Jencks Act was harmless error.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B2-B13) is reported at 47 F.3d 1224. The final decision of the United States Department of Agriculture Judicial Officer (Pet. App. C1-C18) is reported at 52 Agric. Dec. 1617 (1993). The decision of the Administrative Law Judge (Pet. App. D1-D8) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1995. A petition for rehearing was denied on May 12, 1995. Pet. App. A1. The petition for a writ of

certiorari was filed on August 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a New York produce dealer that received its dealer's license from the Department of Agriculture in 1975 pursuant to the Perishable Agricultural Commodities Act of 1930 (PACA or the Act), 7 U.S.C. 499a *et seq.* Pet. App. B3, B4. The Act requires dealers in perishable produce to be licensed by the Department, and to make "full payment promptly" for all produce purchases. 7 U.S.C. 499c (1988 & Supp. V 1993), 499b(4).[1] The Act authorizes the Secretary of Agriculture to revoke the license of dealers found to have committed "flagrant or repeated violations" of the prompt payment rule. 7 U.S.C. 499h(a).

1. On September 28, 1992, the Director of the Fruit and Vegetable Division of the Department of Agriculture issued a complaint charging petitioner with failing to make "full payment promptly" of $424,913.75 owed to ten suppliers for 46 lots of apples. Pet. App. B4, D1-D2.[2] Based on the number and circumstances of petitioner's PACA violations, the Secretary recommended that petitioner's license be revoked. *Id.* at B4. A hearing before an Administrative Law Judge (ALJ)

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[1] Department of Agriculture regulations, 7 C.F.R. 46.2-(aa)(5) and (11), define "full payment promptly" as payment within ten days after the day on which the produce is accepted, except where the seller and buyer agree in writing to an alternative payment schedule before entering into a transaction.

[2] At the time of the administrative hearing in this case, petitioner still owed $255,081.12 to the sellers. Pet. App. D3.

was held on July 21, 1993. *Id.* at D1. At the hearing, petitioner admitted violating the Act, but argued against license revocation as a sanction, asserting that mitigating circumstances warranted a lesser penalty. *Id.* at B4. Clare Jervis, a marketing specialist, presented the Department's recommendation of revocation at the administrative hearing. *Id.* at E2-E3. Jervis also testified that she had reviewed the investigative records in petitioner's case and prepared a brief memorandum analyzing those records. *Id.* at E9. Petitioner requested a copy of Jervis's brief memorandum pursuant to Department of Agriculture regulations providing that the production of witness statements "shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500)." 7 C.F.R. 1.41(g)(1)(iii); see Pet. App. E9. The ALJ reviewed the memorandum *in camera* and denied the request. *Id.* at E16-E17. On August 9, 1993, the ALJ delivered a bench ruling revoking petitioner's PACA license. Pet. App. D8.

Petitioner appealed to the Department's Judicial Officer.[3] The Judicial Officer upheld the revocation sanction (Pet. App. C8), but stayed his order pending disposition of the corporation's petition for review by the court of appeals. *Id.* at B-5.

2. In its petition for review in the court of appeals, petitioner challenged the revocation sanction, arguing that the Secretary abused his discretion in revoking, rather than suspending, petitioner's license.

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[3] The Secretary has delegated final decisionmaking authority in adjudicative proceedings to the Judicial Officer. See 7 C.F.R. 1.132(d), 2.35.

Petitioner also argued that it was entitled to a copy of the Jervis memorandum under the Jencks Act. Pet. App. B5-B6, B8.

The court of appeals denied the petition for review. Pet. App. B1-B13. With regard to the sanction imposed, the court held that the Secretary acted within his discretion in deciding to revoke petitioner's PACA license. *Id.* at B8. Regarding the Jencks Act claim, the court determined that the "bulk" of the brief memorandum prepared by Jervis was not related to her trial testimony and, thus, was not Jencks Act material that the Department was required to produce. *Id.* at B8-B11. The court determined that a few lines in the memorandum—statements addressing the history and status of petitioner's PACA license—did qualify as Jencks Act material, because they related to Jervis's opening testimony on the same subject. *Id.* at B12. The court held, however, that the failure to produce the document was harmless error because the licensing information in the memorandum was "limited and basically innocuous" factual information, to which petitioner had access through its own records. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 5-6) that the Jervis memorandum "served as the basis for making a sanction recommendation," and that, therefore, "the *entire* memorandum 'relates to' Ms. Jervis' testimony and should have been produced under the Jencks Act." That contention lacks merit.

The Jencks Act applies of its own force only in federal criminal prosecutions. See 18 U.S.C. 3500. It is relevant here only because the Department of Agriculture has elected to provide in its regulations

governing administrative adjudications that witness statements shall be made available by reference to the standards in the Jencks Act. See 7 C.F.R. 1.141(g)(1)(iii). The Jencks Act provides that, after a government witness has testified on direct examination, "the court shall, on motion of the defendant, order the United States to produce any statement * * * of the witness in the possession of the United States which relates to the subject matter *as to which the witness has testified.*" 18 U.S.C. 3500(b) (emphasis added). Statements that address the subject matter at issue in the case, but do not relate to topics "as to which the witness has testified," do not fall within the Jencks Act's coverage, and need not be produced. See, *e.g.*, *United States* v. *Susskind*, 4 F.3d 1400, 1404 (6th Cir. 1993) (en banc), cert. denied, 114 S. Ct. 1098 (1994); *United States* v. *Smaldone*, 544 F.2d 456, 462 (10th Cir. 1976), cert. denied, 430 U.S. 967 (1977).

In this case, the government witness's testimony covered three subject areas: (1) petitioner's possession of a PACA license; (2) phone calls made to petitioner's suppliers regarding their monetary claims; and (3) the Department's sanction recommendation. Pet. App. B10. After reviewing the Jervis memorandum, the court of appeals concluded that "[t]he great bulk of [the] memorandum does not bear directly on any of these three subjects." *Ibid.* The court's decision that statements in the memorandum that do not "relate to" Jervis's actual trial testimony are not covered by the Jencks Act is correct, and does not warrant further review.

2. The court of appeals did accord Jencks Act status to that portion of the memorandum in which

Jervis addressed the history and status of petitioner's PACA license. Pet. App. B12. The court ruled, however, that nondisclosure of that material was harmless error because petitioner had independent access to the licensing information contained in the memorandum. *Ibid.*

Contrary to petitioner's contention (Pet. 6-7), the court of appeals' finding of harmless error in this case does not conflict with *Clancy* v. *United States*, 365 U.S. 312 (1961). In *Clancy*, the Court held that where harmless error analysis is relevant to some, but not all, of a group of erroneously withheld statements, reversal is required. See *id.* at 316 ("We do not reach the harmless error point because, if applicable, it is relevant only to the report of one of the agents, not to those of the other two."). Although the harmless error doctrine must be "strictly applied" in criminal prosecutions that are directly governed by the Jencks Act itself, *Goldberg* v. *United States*, 425 U.S. 94, 111 n.21 (1976), it does not follow that an equally strict application of harmless error principles is appropriate on judicial review of an agency decision in an administrative adjudication governed by regulations that merely borrow the substantive standards of the Jencks Act. Judicial review in the latter situation is governed by the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, including its directive that, in reviewing agency action, "due account shall be taken of the rule of prejudicial error." 5 U.S.C. 706.

Moreover, even in a criminal case, where information contained in the only statements deemed Jencks Act material was available to defense counsel through other sources, any Jencks Act violation was harmless. See *Rosenberg* v. *United States*, 360 U.S. 367,

371 (1959) ("when the very same information was possessed by defendant's counsel as would have been available were error not committed, it would offend common sense and the fair administration of justice to order a new trial."); *United States* v. *Pepe*, 747 F.2d 632, 657 (11th Cir. 1984) (failure to produce Jencks Act material already in defendant's possession was harmless error); *United States* v. *Rivero*, 554 F.2d 213, 215 (5th Cir. 1977) (same). The court of appeals' fact-specific determination in this case that information already available to petitioner did not materially differ from Jencks Act material in the Jervis memorandum does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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